Supreme Court, U.S.
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No. 98-1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, *et al.*,
Petitioners,

v.

DR. IRIS I. VARNER, *et al.*,
Respondents,

-and-

UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DR. IRIS I. VARNER, *et al.*

WENDY A. GROSSMAN
Counsel of Record
JOEL J. BELLOWS
NICHOLAS P. IAVARONE
CHRISTOPHER L. GALLINARI
BELLOWS AND BELLOWS
Attorneys for Respondents Dr. Iris I. Varner, et al.
79 West Monroe Street
Suite 800
Chicago, Illinois 60603
(312) 332-3340

151850

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended the Equal Pay Act, 29 U.S.C. § 206(d), in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, 29 U.S.C. §§ 203(d), 203(x), 203(e)(2)(C) and 216(b).

2. Whether Congress acted within its power under Section 5 of the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity in the amendments to the Equal Pay Act, 29 U.S.C. § 206(d).

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
A. Proceedings in the District Court	2
B. Proceedings in the Circuit Court	2
Reasons for Denying the Writ	5
I. The Standards For Granting A Writ Of Certiorari Are Not Met.	5
II. In Amending The Equal Pay Act, Congress Clearly Expressed Its Intent To Abrogate The States' Eleventh Amendment Immunity.	10
III. In Amending The Equal Pay Act, Congress Properly Exercised Its Power To Abrogate The States' Eleventh Amendment Immunity.	16
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

Cases:

Aaron v. Kansas, 115 F.3d 813 (10th Cir. 1997) .. 7, 10, 14

Abril v. Virginia, 145 F.3d 182 (4th Cir. 1998) 7, 10

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 2, 3, 6, 15

Belch v. Board of Regents of the Univ. Sys. of Georgia, 1998 WL 824497 (M.D. Ga. Nov. 20, 1998) 8

City of Boerne v. Flores, __ U.S. __, 117 S. Ct. 2157 (1997) ..... *passim*

City of Rome v. United States, 446 U.S. 156 (1980) 19

Close v. New York, 125 F.3d 31 (2d Cir. 1997) 7, 10

Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998) 7

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 4, 17, 21

Craig v. Boren, 429 U.S. 190 (1976) 9

Dellmuth v. Muth, 491 U.S. 223 (1989) 2, 3, 6, 15

Employees v. Dept. of Public Health & Welfare, 411 U.S. 279 (1973) 10, 11

Cited Authorities

	Page
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	19, 20
Frontiero v. Richardson, 411 U.S. 677 (1973)	9
Hale v. Arizona, 993 F.2d 1387 (9th Cir.), *cert. denied*, 510 U.S. 946 (1993)	7, 10
Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991)	13
Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822 (8th Cir. 1998)	7, 8, 10
Kahn v. Shevin, 416 U.S. 351 (1974)	21
Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998)	7
Larry v. Board of Trustees of the Univ. of Alabama, 975 F. Supp. 1447 (N.D. Ala. 1997)	8
Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)	8
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	18
Mills v. Maine, 118 F.3d 37 (1st Cir. 1997)	7
Mississippi Republican Exec. Comm. v. Brooks, 469 U.S. 1002 (1984)	19

Cited Authorities

	Page
Reed v. Reed, 404 U.S. 71 (1971)	9
Seminole Tribe v. Florida, 517 U.S. 44 (1996)	2, 3, 6, 14
South Carolina v. Katzenbach, 383 U.S. 301 (1966)	19, 20, 21
Thornburg v. Gingles, 478 U.S. 30 (1986)	19
Timmer v. Michigan Dep't of Commerce, 104 F.3d 838 (6th Cir. 1997)	7, 10, 16
United States v. King, 395 U.S. 1 (1969)	16
United States v. Nordic Village, Inc., 503 U.S. 30 (1992)	11
United States v. Virginia, 518 U.S. 515 (1996)	9, 22, 23
Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977)	7, 16
Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977)	7, 16
Ussery v. State of Louisiana, 150 F.3d 431 (5th Cir. 1998)	7, 10, 16
Welch v. Texas Dep't of Highways and Public Transportation, 483 U.S. 468 (1987)	13, 14, 15

Cited Authorities

Page

Statutes:

28 U.S.C. § 1251 12

28 U.S.C. § 1291 12

28 U.S.C. § 1331 12

28 U.S.C. § 1343(a)(3) 12

28 U.S.C. § 1442(a) 16

28 U.S.C. § 1491 12

28 U.S.C. § 1581 12

29 U.S.C. § 203(d) ..... i, 1, 3, 10

29 U.S.C. § 203(e)(2)(C) ..... i, 3, 10

29 U.S.C. § 203(x) ..... i, 2, 3, 10

29 U.S.C. § 206(d) i

29 U.S.C. § 206(d)(1)(i) 18

29 U.S.C. § 206(d)(1)(ii) 18

29 U.S.C. § 206(d)(1)(iii) 18

29 U.S.C. § 206(d)(1)(iv) 18

Cited Authorities

Page

29 U.S.C. § 216(b) ..... i, 2, 3, 10, 11, 12, 15

42 U.S.C. § 1973c 19

42 U.S.C. § 12202 ..... 11, 12

46 U.S.C. § 688(a) 13

United States Constitution:

Eleventh Amendment ..... *passim*

Fourteenth Amendment 14, 18, 19

Fourteenth Amendment, § 1 4

Fourteenth Amendment, § 5 ..... i, 3, 16, 19, 20, 22

Rules:

United States Supreme Court Rule 10 ..... 5, 6, 8, 9

United States Supreme Court Rule 10(a) 6

United States Supreme Court Rule 10(b) 6, 8

United States Supreme Court Rule 10(c) 9

Other Authority:

Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 ..... i, 1

Respondents Dr. Iris I. Varner, Dr. Teresa M. Palmer and Dr. Paula J. Pomerenke, on their own behalf and on behalf of all other persons similarly situated, respectfully submit this Respondents' Brief in Opposition to the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

Respondents do not disagree with Petitioners' Statement of the Opinions Below.

STATEMENT OF JURISDICTION

Respondents do not disagree with Petitioners' Statement of Jurisdiction.

STATUTORY PROVISIONS INVOLVED

The Equal Pay Act, as amended by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, provides in relevant part:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 203(d). The statute, as amended, further provides:

> "Public agency" means the Government of the United States; the government of a State or

> political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x). The statute, as amended, further states in relevant part:

> . . . . An action to recover the liability prescribed in either of the prescribed sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of themselves and other employees similarly situated. . . .

29 U.S.C. § 216(b).

STATEMENT OF THE CASE

A. Proceedings in the District Court

Respondents do not disagree with Petitioners' Statement of the Proceedings In The District Court.

B. Proceedings in the Circuit Court

The circuit court, applying *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in determining Congressional intent and *Seminole Tribe* and *City of Boerne v. Flores*, __ U.S. __, 117 S. Ct. 2157 (1997), in ascertaining Congress's power to manifest its intent,

affirmed the district court's decision that Congress, in a proper exercise of its legislative authority, abrogated the States' Eleventh Amendment immunity in its amendment of the Equal Pay Act.

The circuit court cited Congress' definition of "employer" to include "public agency," 29 U.S.C. § 203(d), its definition of "public agency" to include "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivision of a State," 29 U.S.C. § 203(x), and its definition of "employee" to include "any individual employed by a State, political subdivision of a State, or an interstate governmental agency." 29 U.S.C. § 203(e)(2)(C). The circuit court also cited the private enforcement provision of the statute which provides in relevant part that an action "may be maintained against any employer (including a public agency) in any Federal or state court of competent jurisdiction by any one or more employees." 29 U.S.C. § 216(b) (App. at 8a). The circuit court concluded that these explicit statements expressed the unmistakably clear intent of Congress to abrogate the Eleventh Amendment immunity of the States (App. at 7a-8a) and rejected Petitioners' argument that the statute does not contain any explicit references to the "Eleventh Amendment" or "abrogation of state sovereign immunity" because use of such "magic words" is not required by *Dellmuth*, *Atascadero* and *Seminole Tribe*.

Acknowledging that under *Seminole Tribe* Congress must act pursuant to a constitutional provision granting it the power to abrogate the States' sovereign immunity (App. at 10a-11a), the circuit court also found that Congress, in applying the Equal Pay Act to the States, acted pursuant to its powers under Section 5 of the Fourteenth Amendment, under the standards and principles announced by this Court in *Boerne*. App. at 20a-23a.

The circuit court further recognized that while under *Boerne* Congress cannot expand the substantive rights contained in Section 1 of the Fourteenth Amendment when courts explicitly refuse to recognize the existence of such rights (App. at 19a), legislation that deters or remedies unconstitutional conduct is appropriate "even if in the process it prohibits conduct which is not itself unconstitutional." App. at 19a, *quoting from Boerne*, 117 S. Ct. at 2163. The circuit court then stated:

> For an act to be appropriate remedial legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Boerne*, 117 S. Ct. at 2164

App. at 19a.

In response to Petitioners' contention of a lack of proportionality under *Boerne* between the injury to be prevented and the means adopted to accomplish that end, the circuit court noted that Congress enacted the Equal Pay Act because it found that pervasive discrimination existed whereby women were paid less than men for equal work. App. at 21a-22a, *citing Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).[1] Such findings, the circuit court noted, stood in contrast to the relevant legislative record in

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1. Although Congress did not issue new findings when it extended the Equal Pay Act to the States in 1974, as the circuit court noted, such legislative findings are not required by *Boerne*. App. at 21a, n.13; *Boerne*, 117 S. Ct. at 2169-70. If anything, Congress's silence must be interpreted as a re-affirmation of the injury to be prevented, this time in the public workplace.

Boerne which was devoid of any modern examples of the kind of unconstitutional conduct targeted by the legislation reviewed in that case. App. at 21a.

After the circuit court announced its decision, Petitioners filed a request for rehearing and a suggestion for rehearing *en banc*, which was denied on October 13, 1998.

REASONS FOR DENYING THE WRIT

I.

THE STANDARDS FOR GRANTING A WRIT OF CERTIORARI ARE NOT MET.

The Court should deny Petitioners' writ because the standards for certiorari are not met. None of the enumerated reasons for granting certiorari, set forth in United States Supreme Court Rule 10, is present.

As Rule 10 states, "compelling reasons" for review exist when:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 10, Rules of the Supreme Court of the United States.

There is no state court decision implicated by the petition and so subsection (b) certainly does not apply. Neither does subsection (a) apply. The circuit court's decision cannot seriously be construed as a remote departure from the accepted and usual course of judicial proceedings, especially when it is in agreement with the decisions of every other circuit court to have ruled on the issue.[2]

Nor did the circuit court decide an important federal question in a way that conflicts with the decision of another United States court of appeals on the same important matter. The circuit court's decision is in agreement with every controlling decision from every other circuit court concerning whether Congress, in amending the Equal Pay Act, both

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2. The circuit court correctly stated the rules of this Court's precedents, *Dellmuth*, *Atascadero*, *Seminole Tribe* and *Boerne*. Although Petitioners contend that the circuit court's decision deviated from this Court's precedents, those arguments are without merit because, as set forth below, Petitioners have misstated this Court's precedents.

expressed the intent and possessed the power to abrogate the States' Eleventh Amendment immunity. *Ussery v. State of Louisiana*, 150 F.3d 431 (5th Cir. 1998); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 838-39 (6th Cir. 1997); *Usery v. Charleston County School Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). Furthermore, the circuit court decision is in agreement with every other controlling circuit court decision concerning whether Congress, in enacting the Fair Labor Standards Amendments of 1974, clearly expressed the intent to abrogate the States' Eleventh Amendment immunity. *Abril v. Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 825 (8th Cir. 1998); *Mills v. Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Close v. New York*, 125 F.3d 31, 36 (2d Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 814-15 (10th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1391-92 (9th Cir.) (en banc), *cert. denied*, 510 U.S. 946 (1993).

The only decisions at the circuit court level contrary to the circuit court's decision are non-controlling decisions of individual judges that apply to statutes other than the Equal Pay Act. *Coolbaugh v. Louisiana*, 136 F.3d 430, 440 (5th Cir. 1998) (Smith, J., dissenting) (Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1431 (11th Cir. 1998) (Edmondson, J.) (expressing opinion of one judge on panel that Congress failed to express intent to abrogate in enacting Americans with Disabilities Act, but remaining silent on, if intent were expressed, whether abrogation would be proper exercise of Congressional power); *Kimel*, 139 F.3d at 1444 (Cox, J., concurring in part and dissenting in part) (stating opinion, shared with third judge on panel, that Congress clearly expressed intent to abrogate,

but writing separately that Congress lacked power to abrogate, in enacting Americans with Disabilities Act). A dissenting or concurring opinion delivered in one circuit where it is not controlling authority cannot present a compelling reason for granting certiorari within the meaning of Rule 10 when all controlling majority opinions, and therefore the circuits, are in agreement.

Petitioners are incorrect in their assertion that a district court split within the Eleventh Circuit[3] provides a compelling reason for granting certiorari within the meaning of Rule 10. The responsibility for resolving a split of opinion among district courts rests with the circuit court, not this Court. Only if the Eleventh Circuit were to conclusively decide the issue differently than all the other circuits to have decided the issue might Rule 10(b) apply.

Finally, Petitioners' reliance on *Humenansky* is misplaced. In that decision the Eighth Circuit merely held that legislation directed at discrimination against the aged was impermissibly substantive because "[a]ge is not a suspect class entitled to a heightened level of equal protection scrutiny." 152 F.3d at 827, *citing Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). The present case does not suffer from that infirmity, as gender is a suspect class. Thus, the reasoning in *Humenansky* is not in conflict with either the circuit court's decision because the circuit court's decision or Congressional enactment of the Equal Pay Act; each flows from the innumerable precedents of this Court

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3. *See Larry v. Board of Trustees of the Univ. of Alabama*, 975 F. Supp. 1447, 1449-50 (N.D. Ala. 1997) and *Belch v. Board of Regents of the Univ. Sys. of Georgia*, 1998 WL 824497 (M.D. Ga. Nov. 20, 1998).

that discrimination on the basis of sex does, indeed, call for a heightened level of equal protection scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). As a result, the circuit court's decision is not in conflict with the decision of another United States court of appeals on the same important matter.

For similar reasons to the ones stated above, subsection (c) of Rule 10 also fails to provide a basis for granting certiorari. The circuit court's decision applies and identifies the standards and principles announced by this Court's precedents, in a manner that is entirely consistent with relevant decisions of this Court. Likewise, the circuit court's application of precedent led it to rule consistently with the decisions of every other circuit that has ruled on the same issue. For these reasons, the circuit court's opinion does not decide an issue of federal law that needs to be settled by this Court. Therefore, none of the enumerated bases for granting certiorari is present.

Stripped to its essentials, then, Petitioners' argument is that the circuit court erred in its application of this Court's precedents. As Rule 10 explicitly states, such error "rarely" provides "compelling reasons" to justify the granting of certiorari. Even if this Court were to consider exercising its discretion to review on this basis alone, this Court nevertheless should not grant the petition because, as set forth below, the circuit court applied this Court's precedents properly in finding that Congress, in amending the Equal Pay Act, had both the intent and the power to abrogate the States' Eleventh Amendment immunity.

II.

IN AMENDING THE EQUAL PAY ACT, CONGRESS CLEARLY EXPRESSED ITS INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The circuit court joined every court of appeals to decide the question, in finding that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended the Equal Pay Act. *See Close*, 125 F.3d at 36; *Abril*, 145 F.3d at 186; *Ussery v. Louisiana*, 150 F.3d at 431; *Timmer*, 104 F.3d at 838-89; *Humenansky*, 152 F.3d at 825; *Hale*, 993 F.2d at 1391-92; *Aaron*, 115 F.3d at 814-15. Petitioners' contrary claim does not merit this Court's review.

Petitioners' argument that the circuit court did not base its decision on an examination of the text of the statute is premised on a misrepresentation of the record. The circuit court cited 29 U.S.C. §§ 203(d) and 203(x), which define "employer" to include "public agency" which includes the States. App. at 8a. The circuit court cited 29 U.S.C. § 203(e)(2)(C), which defines "employee" to include employees of the States. App. at 8a. The circuit court further cited 29 U.S.C. § 216(b), which provides a private right of enforcement "against any employer (*including a public agency*) *in any Federal or State court* of competent jurisdiction. . . ." App. at 8a. (emphasis by court). The circuit court did not identify, and Petitioners cannot point to, any materials on which it based its decision other than the text of the statute itself and this Court's precedents. App. at 6a-10a.

Contrary to Petitioners' argument, the circuit court made absolutely no citation to any legislative history. *Id.* While the circuit court did cite *Employees v. Dept. of Public Health & Welfare*, 411 U.S. 279, 284-86 (1973), in which this Court

stated that 1966 amendments to the Fair Labor Standards Act did not abrogate the States' Eleventh Amendment immunity, the circuit court did so in reference to the Equal Pay Act as originally enacted in 1963 (which did not apply to state actors) and to the 1966 amendments to the Fair Labor Standards Act, which only served to clarify that the statutory regime reviewed by this Court in *Employees* is substantially different than the statute reviewed by the circuit court, because of the intervening 1974 amendments. Petitioners' attempt to distort this comparison provides no support for their fallacious argument that the circuit court based its decision on "legislative history" or statutory "structure," when the circuit court decision itself clearly indicates otherwise.[4]

Petitioners next contend that 29 U.S.C. § 216(b), in authorizing suits in "any Federal or state court of competent jurisdiction," fails to clearly express Congressional intent to abrogate. Petitioners argue that by referring to courts "of competent jurisdiction," Congress was referring to courts in which no defense of sovereign immunity would be available and, *ergo*, by authorizing suits against the States in Federal or state courts of competent jurisdiction, Congress was actually re-affirming, and not abrogating, the States' Eleventh Amendment immunity.

This argument is absurd. First, Petitioners concede that the Age Discrimination in Employment Act, 42 U.S.C.

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4. To support their argument that the circuit court based its decision regarding intent to abrogate on an impermissible consideration of statutory "structure," Petitioners rely on *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992). However, *Nordic Village* deals solely with the Federal government's waiver of its sovereign immunity, and so has absolutely nothing to do with the inquiry into whether Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity.

§ 12202, contains a sufficiently clear expression of intent and, yet, that statute employs this precise phrase:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in a Federal or State *court of competent jurisdiction* for a violation of this chapter.

(Emphasis supplied). If, as Petitioners contend, a court of competent jurisdiction is a court where Eleventh Amendment immunity does not apply, then 42 U.S.C. § 12202 is a Congressional exercise in redundancy in its use of "competent jurisdiction."

Second, not all federal courts are courts of "competent jurisdiction" in which to bring suit on Equal Pay Act claims. Neither this Court, *see* 28 U.S.C. § 1251, nor the circuit court, *see* 28 U.S.C. § 1291, nor the United States Court of Federal Claims, *see* 28 U.S.C. § 1491, nor the United States Court of International Trade, *see* 28 U.S.C. § 1581, would have original jurisdiction over an Equal Pay Act claim because of statutory limits placed by Congress on the courts' jurisdiction. Rather, the United States District Court is the court properly authorized by statute to exercise original jurisdiction over such a claim. 28 U.S.C. §§ 1331 and 1343(a)(3). The language regarding "court of competent jurisdiction" has no relationship at all to Eleventh Amendment immunity, but was employed in 29 U.S.C. § 216(b) to coincide with the limitations on federal courts' subject matter jurisdiction that may be crafted from time to time by Congress.[5]

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5. Likewise, the only reasonable interpretation for the reference to state courts "of competent jurisdiction" in 29 U.S.C. § 216(b) is (Cont'd)

Petitioners' further argument — that the 1974 amendments to the Equal Pay Act evince only an intent to authorize suits against the States in state court — likewise is without merit, and the cases relied on by Petitioners are entirely distinguishable.

In *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468 (1987), the Court held merely that the Jones Act, 46 U.S.C. § 688(a), did not abrogate the States' Eleventh Amendment immunity, because it only extended a cause of action to any "seaman who shall suffer personal injury in the course of his employment." 483 U.S. at 475.[6] Once the Court had decided in *Welch* that no abrogation was intended, it was left to the Court in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), to decide the residual issue of whether a claim under the Jones Act was cognizable against the States in state court. The Court in *Hilton* made its decision on *stare decisis* grounds and stated that *Welch* had no bearing on the residual issue because "the Eleventh Amendment does not apply in state courts." 502 U.S. at 204-05. Petitioners' argument that the circuit court improperly conflated two analyses is therefore baseless. The circuit court never arrived at the conclusion that Eleventh Amendment immunity was not abrogated and so was not confronted with the residual issue of *Hilton*,

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(Cont'd)
the contemplation of state statutes governing the jurisdictional authority of the various state courts.

6. By contrast, as the circuit court found, the Equal Pay Act makes explicit reference to the States as employers who are subject to suit in Federal court. App. at 9a.

whether under such circumstances a valid cause of action remains cognizable in state court.[7]

The fact that cases under other sections of the Fair Labor Standards Act are not cognizable in federal court is extraneous to the issue of Congressional intent to abrogate. Rather, that fact stems from Congress's inability to employ the Commerce Clause as a basis for its power to abrogate. *Seminole Tribe*, 517 U.S. at 63-66. As the court in *Aaron* stated,

> The FLSA's extension of liability to states, coupled with its provision allowing suits in federal court, make clear Congress' intent to abrogate the states' Eleventh Amendment immunity with regard to claims brought under the FLSA.

115 F.3d at 815. However, *Aaron* held that Congress had no power to abrogate immunity for the wage and overtime claims before it because such claims were not within the scope of Congress' enforcement power under the Fourteenth Amendment. 115 F.3d at 816-17.[8] Therefore, *Aaron* offers Petitioners no support on intent to abrogate.

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7. Petitioners' argument that abrogation must take into account where the States are to be sued, as well as whether they are to be sued, is misguided. Petitioners rely on a passage from *Welch* discussing the separate and unrelated doctrine of *waiver* of immunity. 483 U.S. at 473-74. There is no argument here that the States have waived their immunity. Rather, the inquiry is Congressional *abrogation* of that immunity which, as the Court in *Welch* recognized, is a separate inquiry.

8. Indeed, *Aaron* explicitly reserved the specific question that Petitioners wish this Court to address, and so provides absolutely no support for their claims. 115 F.3d at 817.

Other precedents of this Court are also distinguishable. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court held that a statute that referred only to "any recipients of federal assistance" did not clearly abrogate Eleventh Amendment immunity. 473 U.S. at 245. Likewise, in *Dellmuth*, 491 U.S. at 223, the Court found that a statute providing judicial review for aggrieved parties "in any State court of competent jurisdiction or in a district court of the United States . . ." but which did not specifically enumerate States among the persons that could be sued under the statute, did not clearly abrogate the States' Eleventh Amendment immunity. The Equal Pay Act, by contrast, as the circuit court found, specifically lists the States among the persons that can be named as defendants in civil actions. App. at 9a.

Petitioners' final argument regarding intent to abrogate is the supposed incongruous result of the Federal government becoming subject to suit in state court if Congress indeed intended to abrogate the States' Eleventh Amendment immunity when it amended the Equal Pay Act in 1974. This argument, founded upon a misstatement of the law, is devoid of logic.

Whether and how the United States subjects itself to suit has nothing to do with abrogation of immunity, and instead is a species of waiver of immunity. Abrogation of immunity and waiver of immunity, as this Court has recognized, require two entirely separate inquiries. *Welch*, 483 U.S. at 473-74. Therefore, interpretation of the effect of 29 U.S.C. § 216(b) on the abrogation of States' Eleventh Amendment immunity need not parallel interpretation of the effect of 29 U.S.C. § 216(b) on the waiver of the Federal government's sovereign immunity. Petitioners present no authority to support the proposition that the abrogation analysis and the separate

waiver analysis must necessarily reach the same result.[9] However, even if the Court were to conclude that the abrogation analysis should necessarily track the waiver analysis, this still would not result in the dire consequences to public policy that Petitioners predict. 28 U.S.C. § 1442(a) grants to the United States, its officers and agencies the right to remove any suit filed in state court to the United States district court.

III.

IN AMENDING THE EQUAL PAY ACT, CONGRESS PROPERLY EXERCISED ITS POWER TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

Every court of appeals to address the question has ruled that the extension of the Equal Pay Act to the States was done properly and pursuant to Congress's power under Section 5 of the Fourteenth Amendment. *Ussery v. Louisiana*, 150 F.3d at 431; *Timmer*, 104 F.3d at 838-89; *Usery v. Charleston*, 558 F.2d at 1171; *Usery v. Allegheny*, 544 F.2d at 155. Petitioners' convoluted arguments to the contrary do not merit this Court's review.

The circuit court, applying *Boerne*, held that the Equal Pay Act was both proportionate and congruent to the constitutional harms Congress sought to prevent (App. at 21a-22a) and that the statute, with its "broad scope of . . . defenses [that] protects employers from liability when the employer has sound reason for wage disparities . . . other than sex,"

9. Petitioners cite *United States v. King*, 395 U.S. 1 (1969). However, *King* does not even address abrogation of States' immunity and nowhere does it state that the two analyses must necessarily track one another.

was reasonably tailored to remedy intentional, gender-based wage discrimination, even though the circuit court found that some discrimination would still fall within the scope of the Equal Pay Act when the level of intent needed to prove a constitutional violation did not exist. App. at 19a-22a.

As the circuit court acknowledged, Congress enacted the Equal Pay Act in 1963 in reaction to the serious and endemic problem of employment discrimination in American industry, and directed its remedial effort solely to the private sector. *Corning Glass Works, Inc. v. Brennan*, 417 U.S. 188, 195 (1974). This in no way intimates that Congress intended to permit the States to be immune from any liability for engaging in unconstitutional sex-based discrimination because in 1974 Congress lengthened the reach of the legislation to encompass the public sector.

The Congressional finding of sex-based discrimination "in many segments of American industry" was properly granted "substantial deference" by the circuit court. App. at 21a. The circuit court acknowledged that, under *Boerne*, 117 S. Ct. at 2164, Congress is given wide latitude to determine where substantive legislation ends and remedial legislation begins. App. at 21a. However, as this Court stated in *Boerne*, 117 S. Ct. at 2169-70, and as the circuit court acknowledged, App. at 21a, n.13, legislative findings in this context are not even required. Therefore, it is of no consequence that when Congress amended the Equal Pay Act in 1974 to extend application to the States, it did not restate its findings from 1963 regarding the pervasive nature of sex discrimination and specify that State actors also engaged in unlawful sex discrimination. The 1974 amendment, itself, makes patently clear the existence of this discriminatory problem in the public sector. No additional "finding" was made, nor was one required. *See Boerne*, 117 S. Ct. at 2169-70.

Petitioners' argument that the Equal Pay Act fails to satisfy the *Boerne* test of congruence and proportionality because it does not require proof of discriminatory intent is a gross exaggeration of the legislation, and is without merit. While it is true that the statute permits an aggrieved party to establish a prima facie case without proving discrimination, as the circuit court opinion relates in detail, the Equal Pay Act provides employers with three affirmative defenses (29 U.S.C. §§ 206(d)(1)(i) through (iii)), plus one catch-all provision that affords employers a defense when pay differential is "*based on any factor other than sex.*" (29 U.S.C. § 206(d)(1)(iv)) (App. at 22a) (emphasis supplied). Therefore, rather than eliminating proof of discrimination, Congress merely shifted the burden of proof, *i.e.*, a wage disparity between a male and female doing the same work creates a rebuttable presumption of gender discrimination which requires the employer to come forward with some basis for the disparity other than gender discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (authorizing similar burden-shifting schemes under Title VII). Therefore, given the expansiveness of the defenses available to an employer, the likelihood of the Equal Pay Act ensnaring a non-discriminating employer is negligible. The circuit court concluded that, given the breadth of defenses available to employers, the Equal Pay Act is reasonably tailored to remedy intentional gender-based wage discrimination. App. at 22a-23a. The circuit court further found that the Equal Pay Act, unlike the legislation in *Boerne*, did not redefine substantive Fourteenth Amendment rights (App. at 22a-23a), and determined that the Equal Pay Act was in proportion to, and congruent with, the goal of deterring and remedying the unconstitutional conduct of intentional discrimination on the basis of sex. App. at 20a-23a.

Even accepting the circuit court's indication that some degree of unintentional, constitutional conduct could be snared in the Equal Pay Act net, the circuit court correctly stated that, under *Boerne*,

> [l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.

117 S. Ct. at 2163. In *South Carolina v. Katzenbach*, 383 U.S. 301, 325-37 (1966) and *City of Rome v. United States*, 446 U.S. 156, 177 (1980), for example, this Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect, even if no discriminatory effect is shown. *See also Thornburg v. Gingles*, 478 U.S. 30, 35 (1986); *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984) (mem.) (upholding 1982 amendments to the Voting Rights Act that permitted challenges based on the discriminatory effects of voting practices, even though the Court had ruled that discriminatory effects alone do not violate the Fourteenth Amendment).

Congressional authority to prevent sex discrimination is equally broad. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), where in the context of a sex discrimination claim the Court held that the Eleventh Amendment is necessarily limited by Section 5 of the Fourteenth Amendment, the Court stated:

> We think that Congress may in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

427 U.S. at 456. There can be no question that the Equal Pay Act is appropriate legislation under *Fitzpatrick*, and that *Fitzpatrick* survives *Boerne*. *See* 117 S. Ct. at 2163.

Petitioners also argue that the circuit court misapplied *Boerne* by failing to find "exceptional conditions" that would warrant the Equal Pay Act's extension to some conduct where no discriminatory intent is proven. Petitioners' reliance on *Boerne* and *South Carolina v. Katzenbach* is misguided because neither precedent requires a finding of "exceptional conditions" to support Congress' exercise of its power under Section 5 of the Fourteenth Amendment.

The statute at issue in *Boerne* imposed a strict scrutiny standard on all state action substantially burdening religion even though there was little evidence of widespread constitutional violations. 117 S. Ct. at 2168-72. The Equal Pay Act seeks only to enforce the settled constitutional right to be free of gender discrimination in salaries, by establishing a remedial scheme that is carefully tailored to detect and prevent those acts (unequal pay for equal work) most likely to be the result of such unlawful discrimination. And, while the Court in *Boerne* found the record lacked "examples of modern instances" of intentional discrimination against religion, 117 S. Ct. at 2169,[10] Congress,

10. Petitioners further misstate the law when they contend that *Boerne* was based "entirely" on the absence in the legislative record of evidence of religious discrimination by the states. Actually, the Court stated that this was not the statute's most serious shortcoming. 117 S. Ct. at 2169-70.

in enacting the Equal Pay Act, recognized that employers intentionally and systematically paid women less than men.[11] Furthermore, *Boerne* was not based on the absence of a narrow set of "exceptional conditions," but rather on the exceptionally broad nature of the statute at issue there. Whereas the Equal Pay Act is directed at one practice, gender-based pay inequity, the statute in *Boerne* was

> . . . not so confined. Sweeping coverage insures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.

117 S. Ct. at 2170.

Likewise, *South Carolina v. Katzenbach* does not require findings of "exceptional" circumstances or conditions. 383 U.S. at 324. And, *Boerne* stated that the specific findings of *South Carolina v. Katzenbach* were not a required component of proper remedial legislation: "This is not to say, of course, that section 5 legislation requires termination dates, geographic restrictions or egregious predicates." 117 S. Ct. at 2170-71. Therefore, Petitioners' argument to the contrary is without merit.[12]

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11. *See Corning*, 417 U.S. at 195; *Kahn v. Shevin*, 416 U.S. 351, 353 (1974).

12. Unlike the Equal Pay Act, which addresses one practice, gender-based pay inequity, *South Carolina v. Katzenbach* confronted the Court with several different practices to be proscribed by the legislation before it. Accordingly, the Court examined the propriety of forbidding each such practice. *South Carolina v. Katzenbach* simply does not require a multiple section-by-section analysis of a statute such as the Equal Pay Act that is aimed at one particular practice.

Equally meritless is Petitioners' argument that evidence of general societal discrimination against women is an insufficient basis upon which to authorize the Equal Pay Act under Section 5 of the Fourteenth Amendment, and contention that *Boerne* compels a finding that the States have engaged in intentional unconstitutional discrimination against women. First, the fact that Congress specifically amended the Act in 1974 to reach into the public workplace is, itself, a powerful statement that state and local attempts (or lack of attempts) had failed to redress this discriminatory situation.[13] Second, *Boerne* explicitly stated that no findings at all were required. 117 S. Ct. at 2169-70 ("It is for Congress to determine the method by which it will reach a decision."). *See also* 117 S. Ct. at 2170-71 (remedial legislation does not require findings of "egregious predicates").[14] Third, Petitioners concede that Congress cannot act "wholly independent of the Supreme Court's case law." Petition at 23, n.11. That case law firmly establishes the history of pervasive and intentional discrimination against women by the States. *See generally United States v. Virginia*, 518 U.S. at 531-33.[15]

13. Petitioners' further argument, that the Equal Pay Act is not properly circumscribed under *Boerne* because Congress decided not to confine suits alleging a violation of the Act to the courts of the very State alleged to have violated the Act, is a less-than-makeweight contention.

14. This statement from *Boerne* directly refutes Petitioners' erroneous contentions that Congress was required to identify specific Constitutional violations by the States when it amended the Equal Pay Act in 1974, or that abrogation of Eleventh Amendment immunity requires legislative findings that the States violated women's Constitutional rights.

15. In *United States v. Virginia*, this Court cited the once-prevalent doctrine "that government, both federal and state, could withhold from

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Finally, Petitioners contend that Illinois' statutory schemes are sufficient to protect the class. This argument is not relevant because authorization of a cause of action cognizable against the States only in state court can never be an abrogation of Eleventh Amendment immunity and so can never be a proportional or congruent abrogation of immunity under *Boerne*. However, the argument proceeds from the inaccurate suggestion that the Illinois statutory scheme provides the same rights and remedies as the Equal Pay Act. First, the Illinois statutes proffered by Petitioners do not explicitly state that gender-based pay inequity is unlawful, as does the Equal Pay Act. Second, those Illinois statutes do not explicitly provide for class relief, as does the Equal Pay Act. Therefore, Petitioners have no basis upon which to argue that the Equal Pay Act is merely redundant of rights conferred under state statutory regimes, even if that were a relevant consideration to the issues that Petitioners ask this Court to review, which it is not.

(Cont'd)
women opportunities accorded men so long as any basis in reason could be conceived for the discrimination." 518 U.S. at 531. *See also id.* ("our Nation has had a long and unfortunate history of sex discrimination").

CONCLUSION

On the basis of the foregoing, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

WENDY A. GROSSMAN
Counsel of Record
JOEL J. BELLOWS
NICHOLAS P. IAVARONE
CHRISTOPHER L. GALLINARI
BELLOWS AND BELLOWS
Attorneys for Respondents
Dr. Iris I. Varner, et al.
79 West Monroe Street
Suite 800
Chicago, Illinois 60603
(312) 332-3340